IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA DAVENPORT DIVISION

	*	
CHERYL BONEBRAKE,	*	
	*	3-99-CV-90209
Plaintiff,	*	
	*	
v.	*	
	*	
WEST BURLINGTON INDEPENDENT	*	
SCHOOL DISTRICT,	*	MEMORANDUM OPINION
	*	AND ORDER
Defendant.	*	
	*	

The Court has before it Defendant's Amended Motion for Summary Judgment and Plaintiff's Cross-Motion for Summary Judgment. Plaintiff alleges in her Complaint that Defendant violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., when it hired a younger person for a full-time food service position instead of promoting her. Defendant argues that it is at least entitled to partial summary judgment because it would have made the same decision regardless of Plaintiff's age. Defendant also argues that it is entitled to summary judgment because Plaintiff failed to file her complaint with the Equal Employment Opportunity Commission ("EEOC") within the 300 day limit. Plaintiff, in turn, argues that she is entitled to summary judgment on the fact that she did file her claim with the EEOC in a timely manner. For the reasons stated below, the Court denies both parties' motions for summary judgment.

I. BACKGROUND

Plaintiff, Cheryl Bonebrake ("Bonebrake"), worked as a part-time food service employee

for the Defendant, the West Burlington Independent School District ("School District"). On May 5, 1998, Bonebrake applied for a full-time position with the School District. She did not receive the job. The person who did receive the job was Michelle Rogers ("Rogers"). At the time, Rogers was thirty-four years old and Bonebrake was fifty.

Exactly when Bonebrake found out about the decision not to offer her the job is a matter of some dispute. Both sides agree that on August 31, 1998, at least, Bonebrake's supervisor, Carol Mullin ("Mullin"), told her. On September 3, Bonebrake and her husband met with School District Superintendent James Sleister ("Sleister"), who is the one who made the decision. Sleister stated in his deposition that he remembered having the meeting, but did not remember what was said at the meeting. Bonebrake and her husband, on the other hand, do claim to remember what was said at the meeting. In her deposition, Bonebrake stated:

In the meeting of September 3, Mr. Sleister stated to my husband and I that the reason Michelle Rogers was hired was because she was younger and they needed somebody younger. He was looking at somebody younger down the road to replace Carol, if she would leave.

- C. Bonebrake Dep. at 17. In his deposition, Bonebrake's husband stated:
 - Q. And what was said concerning the application for full-time employment?
 - A. What was said there, that she did not receive it because she was not certified, and that a younger person was hired because he wanted, looking down into the future, to use her as possible further promotions.
- J. Bonebrake Dep. at 5. Sleister claims that he made the decision on the basis of Rogers' certification, and that he would have made the same decision regardless of age.

II. SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56(c) provides that summary judgment "shall be rendered

forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." An issue is "genuine," "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A fact is "material" if the dispute over it might affect the outcome of the suit under the governing law. *Id*.

The moving party has the burden of demonstrating the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Anderson*, 477 U.S. at 248. In meeting its burden, the moving party may support his or her motion with affidavits, depositions, answers to interrogatories, and admissions. *See Celotex*, 477 U.S. at 323. Once the moving party has carried its burden, the nonmoving party must go beyond the pleadings and, by affidavits or by the depositions, answers to interrogatories, and admissions on file, designate the specific facts showing that there is a genuine issue for trial. *See* Fed. R. Civ. P. 56(c), (e); *Celotex Corp.*, 477 U.S. at 322-323; *Anderson*, 477 U.S. at 257. In order to survive a motion for summary judgment, the nonmoving party must present enough evidence for a reasonable jury to return a verdict in his or her favor. *Anderson*, 477 U.S. at 257.

On a motion for summary judgment, the Court is required to "view the evidence in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences." *United States v. City of Columbia*, 914 F.2d 151, 153 (8th Cir. 1990). The Court does not weigh the evidence or make credibility determinations. *See Anderson*, 477 U.S. at 252. The Court only determines whether there are any disputed issues and, if so, whether those issues are both genuine and material. *Id*.

III. DISCUSSION

The School District admits that Bonebrake has made out a prima facie case under the ADEA. However, in its Motion for Summary Judgment, the School District argued that it should nonetheless be granted summary judgment because it would have made the same decision regardless of age. In her response, Bonebrake pointed out that even if the School District could prove that it would have made the same decision regardless of age, such a showing would not preclude liability. The School District then replied that it should be granted summary judgment as to the affirmative defense, which would then limit the remedies available to Bonebrake at trial. Later, the School District amended its Motion for Summary Judgment to include the argument that Bonebrake failed to file her complaint with the EEOC within the required 300 days. Bonebrake resisted that argument and filed a Cross-Motion for Summary Judgment asking for summary judgment that she did file her complaint with the EEOC in a timely manner. Thus, there are two issues to be decided: (1) whether the School District should be granted summary judgment on its same-decision defense; and (2) whether either party should be granted summary judgment regarding the 300 day filing requirement with the EEOC. The Court deals with these issues seriatim.

A. Same-Decision Defense

When an employment decision was the product of both legitimate and illegitimate motives, the case is called a "mixed-motives" case. *See Radabaugh v. Zip Feed Mills, Inc.*, 997 F.2d 444, 448 (8th Cir. 1993). In such a case, the plaintiff must first show that an illegitimate factor was a motivating factor in an employment decision adverse to her. *Id.* After the plaintiff has made this showing, "the burden shifts to the employer to show that it would have made the

same decision even if it had not taken the illegitimate factor into account." *Id.* Unlike a pretext case, where the burden of persuasion remains with the plaintiff after a prima facie showing, in a mixed-motives case the burden of persuasion shifts to the employer after the plaintiff has made out a prima facie case. *Sargent v. Paul*, 16 F.3d 946, 948 n.5 (8th Cir. 1994). And, as Bonebrake contends, the Eighth Circuit has held that a successful showing by the employer will only limit the remedies available to the plaintiff, rather than preclude liability altogether. *See Breeding v. Arthur J. Gallagher and Co.*, 164 F.3d 1151, 1156 (8th Cir. 1999) (applying § 107 of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m), to the *Price Waterhouse* analysis regarding age discrimination) (citing *Fast v. Southern Union Co., Inc.*, 149 F.3d 885, 889 (8th Cir. 1998).

The School District argues that it would not have given Bonebrake the full-time food service job regardless of her age. It states that of the forty or so applications it received for the job, it decided to "interview only those individuals who had formally completed some education related to food preparation and received a certificate or degree so stating." Def.'s Br. in Supp. of Mot. for Summ. J. at 3. The School District admits that this criterion was not a bona fide job requirement, but nonetheless maintains that it was a legitimate, nondiscriminating factor that was dispositive regarding Bonebrake's application.

Bonebrake, however, points to several pieces of evidence that may refute the School District's affirmative defense. First, Bonebrake points out that the School District had no policy referring to certification when she applied for the job.¹ Second, Bonebrake points out that at the

On June 18, 1998, the School District revised its policy to indicate that, while not required, a certificate would be considered.

time she applied for the job none of the food service workers, with the exception of Mullin, the food service director, had any type of certification. Third, Bonebrake points out that in the four years she worked there she worked right next to the person who performed the job and actually did the duties the job requires. Finally, Bonebrake argues that adopting certification as a dispositive criterion might be just another way to mask age discrimination since almost all of the food service employees at the time were over forty and did not have certifications.

Whether the School District would have made the same decision regardless of Bonebrake's age is a question for the jury. *See Simmons v. New Public School District No. Eight*, 251 F.3d 1210, 1214-15 (8th Cir. 2001) (holding summary judgment was inappropriate where the plaintiff offered direct evidence of gender bias and the employer offered evidence that it would have made the same decision regardless of any alleged gender bias). Based on all the evidence, the Court cannot say that it would be unreasonable for a juror to believe that the School District would not have made the same decision had it not been for Bonebrake's age.

B. 300 Day Filing Requirement with the EEOC

The statute of limitations on filing a complaint with the EEOC in a state like Iowa that also has a law prohibiting discrimination is 300 days. 29 U.S.C. § 626(d). Both parties request summary judgment as to whether Bonebrake timely filed her complaint with the EEOC. The School District's argument is twofold. First, it argues that Bonebrake knew about the employment decision prior to August 31, which would then mean she filed her complaint with the EEOC more than 300 days later. Second, the School District argues that even if Bonebrake did not know of the employment decision until August 31 her complaint was untimely because August 31 was 301 days before she filed her complaint with the EEOC. Bonebrake, on the other

hand, argues that at the earliest she did not know of the decision until August 31, and that filing her complaint 301 days later is timely because either Federal Rule of Civil Procedure 6(a) would extend the deadline to the next Monday because the 300th day was a Sunday or because the 300 day limitations period should be tolled.

There is a genuine issue of material fact as to whether Bonebrake knew of the employment decision prior to August 31. The 300 day limitations period begins to run on the date the adverse employment decision is communicated to the plaintiff. *Dring v. McDonnell Douglas Corp.*, 58 F.3d 1323, 1328 (8th Cir. 1995). In an affidavit, Sleister states that he informed Bonebrake of the decision on August 11, at registration. Sleister also states that Bonebrake was present at an August 26 staff luncheon where Rogers was introduced. Bonebrake, however, states that she was not told of the decision until August 31, when her supervisor informed her that the job was given to Rogers.

However, if Bonebrake did not know about the employment decision until August 31, then her complaint was timely filed with the EEOC. Federal Rule of Civil Procedure 6(a) states, in relevant part, as follows:

In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by *any applicable statute*, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or . . ., in which event the period runs until the end of the next day which is not one of the aforementioned days.

(emphasis added). The Court holds that the ADEA is an applicable statute for purposes of Rule 6(a) and therefore the 300 day filing period may not expire on a Sunday. *See Bethelmie v. New York City Health and Hospitals Corp.*, No. 00 CIV. 3707(FM), 2001 WL 863424 (S.D.N.Y. July

31, 2001) (applying Rule 6(a) to the 300 day filing requirement with the EEOC with regard to the Americans with Disabilities Act). Thus, summary judgment is appropriate for neither party on this issue.

IV. CONCLUSION

Defendant's Amended Motion for Summary Judgment (Clerk's No. 19, 48) and Plaintiff's Cross-Motion for Summary Judgment (Clerk's No. 34) are denied.

IT IS SO ORDERED.

Dated this ___9th___ day of August, 2001.

ROBERT W. PRATT
U.S. DISTRICT JUDGE